

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

LHOIST NORTH AMERICA OF  
ALABAMA, LLC, A SUBSIDIARY  
OF LHOIST NORTH AMERICA,

Case No. 10-CA-221731

Respondent,

and

UNITED STEELWORKERS,

Charging Party.

**RESPONDENT LHOIST NORTH AMERICA OF ALABAMA, LLC'S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

M. Jefferson Starling, III  
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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Respondent Lhoist North America of Alabama, LLC, a Subsidiary of Lhoist North America (“Respondent” or “Lhoist”) files these Exceptions to the Decision of the Administrative Law Judge (“ALJ”):

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
1.	Respondent excepts to the ALJ’s conclusion that Avery didn’t have anything to do at the time he took the call.	p. 8	123-124, 430, Ex. 11	Not Supported by the Record.
2.	Respondent excepts to the ALJ’s finding that McCallum’s statement about what Beam told his employees about the phone policy was hearsay.	p. 15 n.17	371	Misapplication of Law.
3.	Respondent excepts to the ALJ’s finding that Beam should have been called as a witness by Respondent.	p. 15 n.17	N/A	Contrary to Law.
4.	Respondent excepts to the ALJ crediting Avery’s testimony about not having advance “written” notice of the call.	p. 17	122, 125, 477, R. Ex. 8	Improper Credibility Finding.
5.	Respondent excepts to the ALJ crediting Avery’s testimony that McCallum told him he was suspended because he was on Union business.	p. 18	51, 55	Improper Credibility Finding.
6.	Respondent excepts to the ALJ’s finding that there is direct animus and discriminatory motivation because Berkes admitted that she drafted portions of the termination letter because Avery participated in Union activity.	p. 24	310, 62, J. Ex. 6	Erroneous Conclusion of Law.

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7.	Respondent excepts to the ALJ's finding that there is direct animus and discriminatory motivation because Lhoist believed that Avery engaged in Union activity.	p. 24	62, 375, 440, J. Ex. 6	Erroneous Conclusion of Law.
8.	Respondent excepts to the ALJ's finding that there is direct animus and discriminatory motivation because McCallum told Avery that he was suspended due to his Union activity.	p. 24	55, 62, 375	Erroneous Conclusion of Law.
9.	Respondent excepts to the ALJ's finding that Barry's statements about filing a charge are general proof of animus.	p. 24	321-22	Erroneous Conclusion of Law.
10.	Respondent excepts to the ALJ's conclusion that Lhoist relied on the hearing transcript to terminate.	p. 25	125, 134	Not Supported by the Record.
11.	Respondent excepts to the ALJ's finding that Respondent's actions are based on speculation.	p. 25	104-105, 107-108, 119, 60, 32 103-04, 62	Not Supported by the Record.
12.	Respondent excepts to the ALJ's finding that McCallum's testimony about his first two meetings with Avery were confusing as to the dates and sounded rehearsed, without much detail.	p. 9 n.10	55	Improper Credibility Finding.
13.	Respondent excepts to the ALJ awarding little credence to McCallum's version of his conversation with Avery and him based on a lack of detail.	p. 10	55	Improper Credibility Finding.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
14.	Respondent excepts to the ALJ's finding that Barry's initial testimony about the unpublished guideline was in response to leading questions.	p. 15 n.14	305	Misapplication of Law.
15.	Respondent excepts to the ALJ crediting McCallum's admission of "multiple incidents" instead of his later statement that the temporary employee was only caught on his phone twice and concluding that he appeared to be "covering his tracks."	p. 15-16 n.18	N/A	Improper Credibility Finding.
16.	Respondent excepts to the ALJ crediting Avery's testimony that he had no written notice of unemployment hearing.	p. 17	122, 125, 477, R. Ex. 8	Improper Credibility Finding.
17.	Respondent excepts to the ALJ discrediting Lhoist's assumptions that Avery had advance notice of the unemployment.	p. 17	122, 125, 477, R. Ex. 8	Improper Credibility Finding.
18.	Respondent excepts to the ALJ crediting Avery's testimony that the higher ups wanted him terminated in January 2018 for violating the no call/no show policy.	p. 17	39-40	Improper Credibility Finding.
19	Respondent excepts to the ALJ's crediting Wilson's testimony as a current employee.	p. 15, 17	66, 178, 182, 204, 210-11	Improper Credibility Finding.
20.	Respondent excepts to the ALJ's establishment of a standard where "I generally discredit the testimony of Respondent's witnesses unless it is an admission against interest or corroborated by other reliable evidence."	p. 17	N/A	Erroneous Conclusion of Law.

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21.	Respondent excepts to the ALJ's repeated conclusion that, throughout the hearing, Lhoist used leading questions during direct examination.	p. 17	375, 305, 300-01, 303, 427-283	Misapplication of Law.
22.	Respondent excepts to the ALJ discrediting Barry's testimony about the November 2018 cell phone policy publication.	p. 17-18	248-49, 300-01, 331	Improper Credibility Finding.
23.	Respondent excepts to the ALJ discrediting Lhoist's witnesses testifying that a cell phone policy existed before November 2018.	p. 18	248-49, 331	Improper Credibility Finding.
24.	Respondent excepts to the ALJ's finding that McCallum's testimony about telling employees to get off their phones has little, if any, weight.	p. 18	388-90	Improper Credibility Finding.
25.	Respondent excepts to the ALJ crediting Avery's testimony that McCallum told him he was suspended because he was on Union business.	p. 18	55	Improper Credibility Finding.
26.	Respondent excepts to the ALJ's conclusion that because a number of questions to Berkes were leading and answered before an objection could be launched, the answers are entitled to "minimal weight."	p. 18	427-28	Improper Credibility Finding and Misapplication of Law.
27.	Respondent excepts to the ALJ's finding that Berkes "merely capitulated to the proposition" on the duration of Avery's call based on leading questions and is therefore not credited.	p. 19	427-28	Not Supported by the Record and Misapplication of Law.

Exception No.	Exception	Citation to Order	Citation to Record	Grounds for Exception
28.	Respondent excepts to the ALJ's finding that Berkes' testimony about Avery's termination letter undermines her testimony about whether Lhoist discussed Avery's role during the unemployment hearing at the termination meeting.	p. 20	440, 62, J. Ex. 6, 452-53,	Not Supported by the Record and Improper Credibility Finding.
29.	Respondent excepts to the ALJ discrediting Barry's testimony about the significance of Avery's role in the hearing.	p. 20	N/A	Improper Credibility Finding.
30.	Respondent excepts to the ALJ's conclusion that Avery's participation in the unemployment hearing was protected concerted activity.	p. 21, 23	N/A	Erroneous Conclusion of Law and Not Supported by the Record.
31.	Respondent excepts to the ALJ's failure to discuss or analyze whether Avery's activity lost protection due to the circumstances because he attended the hearing and testified in contravention of Lhoist's lawful rules thereby forfeiting protection.	p. 23	N/A	Failure to complete analysis.
32.	Respondent excepts to the ALJ's decision not to analyze the facts under <i>Burnup &amp; Sims</i> because of her finding that Lhoist's reasons are not based on good faith.	p. 21 n.20	N/A	Failure to complete analysis.
33.	Respondent excepts to the ALJ's finding that participation in unemployment hearings on behalf of a terminated employee is a concerted activity.	p. 23	N/A	Erroneous Conclusion of Law.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
34.	Respondent excepts to the ALJ's finding that knowledge of the protected concerted activity and Union activity is evident and undisputed.	p. 23	N/A	Not supported by the Record.
35.	Respondent excepts to the ALJ's finding that Berkes prepared portions of Avery's termination letter because Avery participated in Union activity.	p. 24	440, 62, J. Ex. 6	Not Supported by the Record.
36.	Respondent excepts to the ALJ's finding that Berkes' basis for the termination letter established animus.	p. 24	440, 62, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
37.	Respondent excepts to the ALJ's finding that McCallum's statement about Union activity establish animus.	p. 24	55	Erroneous Conclusion of Law and Not Supported by the Record.
38.	Respondent excepts to the ALJ's finding that Berkes' statement that Avery engaged in the same conduct from January 2018 arbitration hearing shows hostility towards Union activities.	p. 24	442, 62, J. Ec. 6	Erroneous Conclusion of Law and Not Supported by the Record.
39.	Respondent excepts to the ALJ's finding that Barry telling Avery that the higher ups wanted him terminated in January 2018 for arbitration hearing no show shows hostility toward Union activities.	p. 24	39-40, R. Ex. 5	Erroneous Conclusion of Law and Not Supported by the Record.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
40.	Respondent excepts to the ALJ's conclusion that Barry exhibited animus by informing Avery that the "higher ups" wanted him terminated for his January 2018 No Call/No Show violation because that issue was not properly before the ALJ and evidence establishes that termination would have been appropriate for that violation.	p. 24	39-40, R. Ex. 5	Erroneous Conclusion of Law and Not Supported by the Record.
41.	Respondent excepts to the ALJ's finding that Barry's statements about filing a charge show animus.	p. 24	319-20	Erroneous Conclusion of Law and Not Supported by the Record.
42.	Respondent excepts to the ALJ's finding that Lhoist's investigation was "truncated," which showed animus.	p. 25	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Erroneous Conclusion of Law and Not Supported by the Record.
43.	Respondent excepts to the ALJ's finding that Lhoist's failure to take notes during its investigation showed animus.	p. 25	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Erroneous Conclusion of Law and Not Supported by the Record.
44.	Respondent excepts to the ALJ's finding that Lhoist's failure to interview supervisors during its investigation showed animus.	p.25	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Erroneous Conclusion of Law and Not Supported by the Record.



<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
45.	Respondent excepts to the ALJ's finding that failure to call Avery's supervisors to testify, about whether the call affected his work or the cell phone policy, creates an adverse inference that they would testify contrary to Lhoist's position.	p. 25	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Erroneous Conclusion of Law and Not Supported by the Record.
46.	Respondent excepts to the ALJ's finding that there was no evidence in the record to support Avery having notice of the call.	p. 25	122, 125, R. Ex. 8	Not Supported by the Record.
47.	Respondent excepts to the ALJ's finding that Lhoist's actions are based on speculation about Avery having notice of the call and are therefore unreliable.	p. 25	122, 125, R. Ex. 8	Not Supported by the Record.
48.	Respondent excepts to the ALJ's finding that the transcript is hearsay and only admissible to demonstrate Lhoist's belated reliance upon it.	p. 25-26 n. 24	125, 134	Misapplication of Law and Erroneous Conclusion of Law.
49.	Respondent excepts to the ALJ's finding that Lhoist mistakenly relied upon Section 16.3 to warrant Avery's suspension and termination.	p. 26	R. Ex. 10,	Not Supported by the Record.
50.	Respondent excepts to the ALJ's finding that Lhoist shifted regarding how long Avery was on the call and application of the cell phone policy.	p. 26	305, 428-29	Not Supported by the Record.

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51.	Respondent excepts to the ALJ's finding that Lhoist shifted explanations about why the first no call/no show discipline did not fall off Avery's record after 1 year.	p. 26	91, 307-08, J. Exs. 4-5, R. Ex. 5	Not Supported by the Record.
52.	Respondent excepts to the ALJ's conclusion that McCallum could have changed Avery's time but declined to do so.	p. 26	N/A	Not Supported by the Record.
53.	Respondent excepts to the ALJ's finding that Lhoist shifted its position on the cell phone policy.	p. 26	62, 55, 310, 440	Not Supported by the Record.
54.	Respondent excepts to the ALJ's finding that timing of the discipline for the call shows animus because of its proximity.	p. 27	N/A	Erroneous Conclusion of Law.
55.	Respondent excepts to the ALJ's finding that Lhoist's failure to not discipline Wilson does not translate into lack of animus.	p. 27	N/A	Erroneous Conclusion of Law.
56.	Respondent excepts to the ALJ's finding that the temporary employee was terminated for "multiple offenses" and, thus, we treated Avery unfairly in terminating him for one incident.	p. 27	390-91	Not Supported by the Record.
57.	Respondent excepts to the ALJ's finding that Cameron's discipline was distinguishable from Avery's discipline by concluding that Cameron was suspended for using a cell phone while operating equipment.	p. 27	251-53	Not Supported by the Record.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
58.	Respondent excepts to the ALJ's finding that Lhoist disparately relies upon the cell phone policy that did not exist at the time of Avery's discharge.	p. 28	62, 55, 310, 440	Erroneous Conclusion of Law and Not Supported by the Record.
59.	Respondent excepts to the ALJ's finding that Lhoist did not demonstrate how long other employees were on the phone when McCallum caught them.	p. 28	388-90	Not Supported by the Record.
60.	Respondent excepts to the ALJ's finding that Thomas violated more rules than Avery, so Lhoist disparately treated Avery.	p. 28	245-48, 293-96	Erroneous Conclusion of Law and Not Supported by the Record.
61.	Respondent excepts to the ALJ's conclusion that General Counsel made a strong showing of discriminatory motive with direct and circumstantial evidence.	p. 29	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Erroneous Conclusion of Law.
62.	Respondent excepts to the ALJ's finding that Lhoist disparately treated Avery regarding falsification of records.	p. 29	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440	Erroneous Conclusion of Law and Not Supported by the Record.
63.	Respondent excepts to the ALJ's finding that Lhoist's treatment and failure to give "clear, consistent and credible explanation for discipline supports a finding of pretext."	p. 29	62, 55, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
64.	Respondent excepts to the ALJ's finding that Lhoist's explanations at the hearing for much of the termination letter are not about falsification of time records, but about performing perceived Union activities after Avery's break time.	p. 29	62, 55, 310, 440, J. Ex. 6	Not Supported by the Record.
65.	Respondent excepts to the ALJ's finding that Lhoist cannot rely upon the violation of the falsification of time records when it is a pretext to discipline Avery for his Union and protected concerted activities.	p. 29	62, 55, 310, 440, J. Ex. 6	Erroneous Conclusion of Law.
66.	Respondent excepts to the ALJ's finding that lack of a cell phone policy weakens Lhoist's argument.	p. 29	N/A	Erroneous Conclusion of Law and Not Supported by the Record.
67.	Respondent excepts to the ALJ's finding that Lhoist fails to show it would have taken the same action absent the protected conduct.	p. 29	62, 55, 310, 440, J. Ex. 6	Not Supported by the Record.
68.	Respondent excepts to the ALJ's finding that Lhoist violated Section 8(a)(1) because of Avery's participation in Union activity.	p. 30-31	62, 55, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
69.	Respondent excepts to the ALJ's finding that Lhoist did not question the supervisors about Avery's break or whether he was at his post.	p. 30	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Not Supported by the Record.

Exception No.	Exception	Citation to Order	Citation to Record	Grounds for Exception
70.	Respondent excepts to the ALJ's finding that Avery's testimony regarding the break and whether he was at his post is "uncontradicted."	p. 30	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Not Supported by the Record.
71.	Respondent excepts to the ALJ's finding that Lhoist did not demonstrate that Avery's participation affected production.	p. 30	51-54, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310	Not Supported by the Record.
72.	Respondent excepts to the ALJ's finding that Lhoist treated Avery differently for this particular break because he was engaged in protected concerted activity during an unemployment hearing.	p. 30	62, 55, 310, 440, J. Ex. 6	Not Supported by the Record.
73.	Respondent excepts to the ALJ's finding that <i>Vokas Provision Co.</i> does not apply.	p. 30-31	N/A	Erroneous Conclusion of Law.
74.	Respondent excepts to the ALJ's finding that Lhoist violated Section 8(a)(3) because Berkes and McCallum relied on Avery's Union activity.	p. 31	62, 55, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
75.	Respondent excepts to the ALJ's finding that Lhoist supervisors were complicit in Avery's falsification of records.	p. 31	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Not Supported by the Record.
76.	Respondent excepts to the ALJ's finding that Lhoist "overbroadly" applied Section 16.3 of the CBA.	p. 32-33	R. Ex. 10	Not Supported by the Record.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
77.	Respondent excepts to the ALJ's finding that Section 16.3 does not include unemployment hearings.	p. 32	R. Ex. 10	Not Supported by the Record.
78.	Respondent excepts to the ALJ's finding that Lhoist discriminately applied Section 16.3 to Avery.	p. 32	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6, R. Ex. 10	Not Supported by the Record.
79.	Respondent excepts to the ALJ's finding that Lhoist's "time to find a replacement" argument is unavailing because it had no need for a replacement during the unemployment hearing.	p. 33	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Not Supported by the Record.
80.	Respondent excepts to the ALJ's finding that Lhoist's additional affirmative defenses are not supported by the record.	p. 33	N/A	Erroneous Conclusion of Law and Not Supported by the Record.
81.	Respondent excepts to the ALJ's conclusion that Lhoist suspended Avery because Avery engaged in concerted activity.	p. 24	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
82.	Respondent excepts to the ALJ's conclusion that Lhoist terminated Avery because Avery engaged in concerted activity.	p. 24	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.

<b>Exception No.</b>	<b>Exception</b>	<b>Citation to Order</b>	<b>Citation to Record</b>	<b>Grounds for Exception</b>
83.	Respondent excepts to the ALJ's finding that Lhoist suspended Avery to discourage Concerted Activity.	p. 24	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
84.	Respondent also excepts to the ALJ's finding that Lhoist terminated Avery to discourage Concerted Activity.	p. 24	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
85.	Respondent excepts to the ALJ's finding that Barry showed animus when he uttered anti-Union language during an unrelated Union meeting.	p. 24	321-22	Erroneous Conclusion of Law and Not Supported by the Record.
86.	Respondent excepts to the ALJ's finding of disparate treatment and the basis therefore.	p. 15, 27	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
87.	Respondent excepts to the ALJ's finding that Avery was engaged in protected concerted activity and the basis therefore.	p. 23	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.

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88.	Respondent excepts to the ALJ's findings that Lhoist demonstrated animus and the basis therefore.	p. 24	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
89.	Respondent excepts to the ALJ's findings that Lhoist's reasons were pretext and the basis therefore.	p. 28	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
90.	Respondent excepts to the ALJ's findings that Lhoist violated Section 8(a)(1) and the basis therefore.	p. 30	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.
91.	Respondent excepts to the ALJ's findings that Lhoist violated Section 8(a)(3) and the basis therefore.	p. 31	51-55, 57-60, 62, 103-05, 107-08, 119, 132, 284-85, 310, 440, J. Ex. 6	Erroneous Conclusion of Law and Not Supported by the Record.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing using the NLRB's electronic filing system and a copy was served on the following via electronic mail this the 2nd day of July, 2020.

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